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In The

Supreme Court Of The United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR., AND ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CONNECTICUT IN SUPPORT OF RESPONDENT

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TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

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Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) 11, 24

Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985) 10, 27

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Great Northern Railway v. Sunburst Co., 287 U.S. 358 (1932) 23

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Cases: **Page(s)**

Hurd v. Hodge, 334 U.S. 24 (1948) 22

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Mistretta v. United States, ___ U.S. ___, 109 S.Ct. 647 (1989) 21

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) 23

Public Citizen v. United States Dept. of Justice, ___ U.S. ___, 109 S.Ct. 2558 (1989) 13

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Trafelet v. Thompson, 594 F.2d 623 (7th Cir. 1979), *cert. denied*, 444 U.S. 906 (1979) 6

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United States v. Blasius, 397 F.2d 203 (2d Cir. 1968), *cert. denied*, 393 U.S. 1008 (1969) 18

United States v. Downey, 195 F. Supp. 581 (S.D. Ill. 1961) 10

United States v. Nixon, 418 U.S. 683 (1974) 21

United States v. Turkette, 452 U.S. 576 (1981) 20

Wright v. Vinton Branch, etc., 300 U.S. 440 (1937) 19

Younger v. Harris, 401 U.S. 37 (1971) 28

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U.S. Const., Art. IV, § 4 10

28 U.S.C. § 45 26

28 U.S.C. § 136 26

29 U.S.C. § 630(f) 1

Constitutions and Statutes: **Page(s)**

Conn. Const., Art. Fifth, § 2, as amended by Art. XXV, Const. Amend. 1, 8

Conn. Const., Art. Fifth, § 4 8

Conn. Const., Art. Fifth, § 6, as amended by Art. VIII, § 2, Const. Amend. 1

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§ 51-51n, Conn. Gen. Stat. 6

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Rules for the Superior Court, State of Connecticut,

1 Conn. Practice Book, § 1 24

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Other Authorities: **Page(s)**

B. Cardozo, *The Nature of the Judicial Process* (1922) 22

118 Congressional Record (1972) 16-17, 17, 18, 19

6A A. Corbin, *Corbin on Contracts* (1962) 21

Cotter, *The Constitutional Court*, 34 Conn. Bar J. 91 (1960) 25

Council of State Governments, 27 *Book of the States* (1988-89 ed.) 8

The Federalist (Mentor ed. 1961) 2-3, 8-9, 9

Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L.Rev. 84 (1985) 27-28, 28

Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442 (1983) 25

O.W. Holmes, Jr., *The Common Law* (1881) 21-22

Inglis, *The Selection and Tenure of Judges*, 22 Conn. Bar J. 106 (1948) 8

Law is Justice, Notable Opinions of Mr. Justice Cardozo (A. Sainer ed. 1938) 22

Satter and Geballe, *Litigation Under the Connecticut Constitution — Developing a Sound Jurisprudence*, 15 Conn. L.R. 57 (1982) 24

Other Authorities: **Page(s)**

The Social and Economic Views of Mr. Justice Brandeis (A. Lief ed. 1930) 22

2A Sutherland, *Statutes and Statutory Construction* (4th ed. 1984) 14, 20

L. Tribe, *American Constitutional Law* (2d ed. 1988) 2, 11-12, 12, 27, 28

1972 U.S. Code Cong. & Ad. News 18

J. Walker, *Decisionmaking in Government: A Personal Perspective*, 36 Fed. Bar J. 333 (1989) 21

Webster's Third New International Dictionary (1961) 20-21

INTEREST OF AMICUS CURIAE STATE OF CONNECTICUT

Connecticut's constitutional court structure could be affected by this appeal.[1]

Connecticut also has an evidentiary record concerning some of the key issues before the Supreme Court. This evidence may not be present in other cases of this nature, and may assist this Court. *See* Appendix.

Judges of all courts in the State of Connecticut, except Courts of Probate, are not elected. They are nominated by the Governor exclusively from candidates submitted by the Judicial Selection Commission. Conn. Const., Art. Fifth, § 2.

The judges nominated are appointed by the General Assembly for an eight-year term. *Id.* Because of their method of appointment, these judges are not exempted as elected officials under 29 U.S.C. § 630(f) of the Age Discrimination in Employment Act (ADEA).

The Constitution of Connecticut, furthermore, provides that:

> No judge shall be eligible to hold his office after he shall arrive at the age of seventy years, except that a chief justice or judge of the supreme court, a judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee.

Art. Fifth, § 6, as amended by Art. VIII, § 2 of the Constitutional Amendments.

State referees may hear specified civil cases and shall exercise the powers of the Superior Court with respect to trial, judgment and appeal. Section 52-434(a), Conn. Gen. Stat. A referee may also hear adversary cases if designated a trial

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[1] This brief is submitted pursuant to Rule 37.5, Rules of the United States Supreme Court.

referee by the Chief Justice. That term is for one year, § 52-434(b), Conn. Gen. Stat.

The Connecticut judicial framework as set forth above is directly implicated by the petitioners' demands.

In fact, a temporary restraining order was issued against the Connecticut Judicial Department, the Chief Justice of Connecticut, Ellen A. Peters, and the Chief Court Administrator, Judge Aaron Ment, by the U.S. District Court, District of Connecticut (Cabranes, J.), on August 15, 1989, prohibiting them from removing a State Judge when he became 70. *Robert Satter v. The Connecticut Judicial Department, Ellen Peters and Aaron Ment,* Civ. No. H-89-525 (JAC). It is the relevant evidence from this case which we submit in the Appendix.

SUMMARY OF ARGUMENT

The ability of our State to structure one of her most basic institutions, the judicial branch of government, as the people deem best, is at issue here. This question also affects virtually every other State of the Union.

The evidence in the Connecticut case demonstrates how legitimate public interests of a State can be injured by striking down the State Constitutional provisions involved.

In addition, there is no clear and manifest Congressional intent to preempt the judicial tenure laws involved.

The relevant legislative history, furthermore, indicates that State judges, both elected *and* appointed, were intended to be exempt.

They are also inextricably involved in formulating state judicial policy.

What is at stake are the " 'tacit postulates' " of federalism which ensure that the existence of the States is a meaningful one. *See* L. Tribe, *American Constitutional Law,* § 5-22, at 397 (2d ed. 1988).

We are dealing with a core State determination concerning her judiciary system. This directly implicates "the

constitutional equilibrium between the general and the State governments." *The Federalist* No. 31, at 197 (A. Hamilton) (Mentor ed. 1961).

ARGUMENT

I. THERE IS NO CLEAR AND MANIFEST CONGRESSIONAL INTENT TO PREEMPT STATE CONSTITUTIONAL AND OTHER PROVISIONS CONCERNING TENURE OF STATE JUDGES.

A. PETITIONERS' CLAIMS STRIKE AT THE HEART OF SELF-GOVERNMENT BY THE STATES.

1. The Tenure Of State Judges Is Of Great Importance To A State.

The Court of Appeals correctly recognized that "the tenure of state judges is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." *Gregory v. Ashcroft,* 898 F.2d 598, 600 (8th Cir. 1990). As the First Circuit has acknowledged, the ADEA should not "overrule the clear intent of the people of a state in an area intimately and fundamentally related to that state's self-governance." *E.E.O.C. v. Commonwealth of Mass.,* 858 F.2d 52, 53 (1st Cir. 1988). The tenure of state judges is a question of great interest to each state. *Id.* "Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very close to the heart of state sovereignty." *Id.*

2. The Testimony In The Connecticut Case Shows The Adverse Impact That Invalidation Of State Constitutional Provisions Concerning Judicial Tenure Can Have.

The adverse impact on the State's judicial system of invalidating State Constitutional provisions for retirement is shown by evidence in the Connecticut case.

In that proceeding, the Chief Court Administrator of Connecticut, Judge Aaron Ment, testified. As Chief Court Administrator, he oversees the day-to-day administration of the Judicial Department, including the assignment of judges. App., 11A.

A major part of his responsibility is to deal with the legislature. App., 17A. He has had discussions with the State legislature concerning the effects of court invalidation of the state judicial retirement provisions. App., 18–19A. These discussions have been with the Judiciary Committee as well as the legislative leadership. App., 19A.

He was asked:

> Q. Now, based on your experience and your knowledge, and your work with the General Assembly, what effect, if any, do you anticipate there would be on the State Judicial Department if the provision concerning mandatory retirement of judges at age 70 were to be struck down?
>
> * * * *

He testified:

> A. There are several probable responses by the General Assembly.
>
> The first I believe would be for them to re-examine the constitutional provision for eight year terms. It has been suggested several times that they feel that if, in fact, the present constitutional basis for the eight year term is invalid, they would review that with the idea of shortening the term to allow them to have a more frequent review of the judges.
>
> Q. Now, why would they want to shorten the term?
>
> A. They would want to shorten the term because they would feel that an eight year term would be too long in view of what they consider to be the higher degree of likelihood of infirmity at later ages. App., 19–21A.
>
> * * * *

> A. All right. What effect would that have on judicial independence?
>
> * * * *
>
> A. The shorter the term, the more difficult the issue of judicial independence becomes.
>
> We already have a situation where many judges are concerned, especially in the two or three years prior to their reappointment. Several judges recently were not reappointed by the General Assembly, and the difficulty of balancing independence versus accountability is one that we struggle with every day.
>
> The shorter the term, the more weight there is on the accountability side, the less weight on the independence side, and I have great concern that the judicial independence in Connecticut would be lessened. App., 24–25A.

The claim that this problem could somehow be avoided by some type of administrative review (*See, e.g.*, Petitioners' Brief, pp. 29–30) is illusory.

As the First Circuit stated, this would require states "to take up the perilous task of evaluating the performance of its older judges, and impeaching" or otherwise removing them. 858 F.2d at 57. This "task is as undesirable as it is difficult." *Id.* It requires close legislative and executive scrutiny of judges. As a result, judicial independence is lost. *Id.* These methods of removal are also extraordinary ones, not suited for the normal " 'discharge for cause.' " *Id.*

This is also corroborated by Judge Ment's testimony:

> Q. Why can't the legislature rely on some of these other methods to deal with these problems, such as the Judicial Review Council, and the impeachment process, and the removal by address of the General Assembly, two-thirds, I believe?
>
> A. Those processes are deliberately made cumbersome and difficult to use, as they should be.

When those methods are used, and they've been used infrequently to my knowledge, the entire bench suffers. And I think the legislature realizes this and is reluctant to use them and reluctant to rely upon them. App., 25A.

For example, the State Judicial Review Council first must conduct a confidential probable cause investigation and hearing. Section 51-51l(a), Conn. Gen. Stat. If probable cause is found, a full hearing with right to counsel, presentation of evidence, and cross-examination is held. *Id.* at § 51-51l(c).

This hearing shall be public. *Id.*

Furthermore, these removal systems as a practical matter would require that public harm had occurred before they could be used. The same is true for impeachment and removal by the Governor on legislative address. *See* Conn. Const., Art. Fifth as amended by Art. XI, Const. Amend.; Art. Ninth; *see also* Conn. Gen. Stat. §§ 51-51j, 51-51n(a) (Judicial Review Council).

The anguish, delay, burden and the inevitable embarrassment to the judiciary and stigma to the judge himself that these removal procedures entail are well recognized. *Malmed v. Thornburgh*, 621 F.2d 565, 568-73, 578 n.19 (3d Cir. 1980), *cert. denied*, 449 U.S. 955 (1980), and cases cited therein; *Trafelet v. Thompson*, 594 F.2d 623, 628 (7th Cir. 1979), *cert. denied*, 444 U.S. 906 (1979); *State ex rel. Keefe v. Eyrich, et al.*, 22 Ohio St. 3d 164, 489 N.E. 2d 259, 261 (1986); *Aronstam et al. v. Cashman*, 132 Vt. 538, 325 A.2d 361, 364-66 (1974). All these decisions upheld State mandatory retirement provisions for judges against various constitutional and other attacks.

Invalidating State Constitutional provisions for judicial tenure could impair other state interests as well, Judge Ment testified.

A. We would be limited in the number of judges or in the number of individuals that we would have available to us to perform the necessary functions of the court.

For example, it would be less likely that we would have as many referees as we now have. And the referee program as it now is constituted is really a two-for-one.

We have the use of the referee when that referee cares to work, which in 39 instances is fairly often during the year. And we also receive a replacement judge. We would not have that under the other theory.

Q. Now, would this have any — apart from that, would this have any effect on the issue of judicial turnover?

A. One of the things that we're looking for is to make the bench more representative of the society in which we live. There would be less turnover. There would be less turnover, less opportunity for women and minorities to enter the system. App., 25-26A.

3. ADEA Control Over Appointed Judges Could Create An Undesirable Pressure To Revert To Elections For Judges.

There is an additional major injury to legitimate state interests involved in this case: pressure to revert to elections as a way of selecting judges. The Court of Appeals rightly noted that if the ADEA controlled appointed judges, "it would create an incentive for Missouri [or any other State] to . . . . return to selecting all its judges through a purely elective process." 898 F.2d at 603.

This would "introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have state judges appointed." *Id.*

Any distinction, moreover, between elected and appointed judges for the purpose of exemption from the ADEA is "nonsensical in terms of furthering the balancing intended by Congress." *Massachusetts*, 858 F.2d at 57.

Such a distinction would produce especially irrational results in those states where some judges are elected and others appointed, and also where judges are initially appointed and later elected. *See* Council of State Governments, 27 *Book of the States* Table 4.4 at 163-65 (1988-89 ed.). In Connecticut, for example, Probate Judges are elected while all other judges are appointed. Conn. Const. Art. Fifth, §§ 2 and 4.

There is no justification to exempt the Probate Judges, whose jurisdiction is limited, but not the constitutional judges of courts of general jurisdiction, i.e., the Superior Court.

4. The Right Of Each State To Select Its Own Method Of Judicial Tenure Is Essential For State Self-Government.

The pressure to revert to elections for all judges would be a major intrusion on state self-government. "This Commonwealth has never wavered from the principle that an independent and competent judiciary can best be achieved and maintained by the appointment, rather than by the election of judges." *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 517 N.E.2d 141, 145 (1988).

The same is equally true for not only Connecticut, but also the United States. *See* U.S. Const., Art. II, § 2, cls. 2, providing for appointment of judges.

As Judge [later Chief Justice] Ernest A. Inglis stated, "Certainly the method by which judges are selected and the term prescribed for their tenure do have a substantial bearing" on obtaining the best judiciary system. Inglis, *The Selection and Tenure of Judges*, 22 Conn. Bar J. 106, 118 (1948). Selection by popular election jeopardizes judicial independence. *Id.* at 115. "That selection is, in most cases, made by the political boss . . . . How untrammeled can a judge be under those circumstances?" *Id.*

The mode of appointment of federal judges was deemed important enough to our country to be discussed specifically in the Federalist papers. *The Federalist* No. 78, at 464

(A. Hamilton) (Mentor ed. 1961); *id.* No. 39, at 242 (J. Madison). It is of equal importance to the states.

There is nothing to suggest that Congress sought to compel the States to elect judges in order to require their retirement at a maximum age. *See Apkin*, 517 N.E.2d at 146. In fact, the framers of the Constitution left to the several States a "residuary and inviolable sovereignty over all other objects" not vested in the national government. *The Federalist, supra*, No. 39, at 245 (J. Madison). The jurisdiction of the latter embraced "certain enumerated objects only." *Id.*

The powers reserved to the several States "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* No. 45, at 293 (J. Madison). The States retain "a very extensive portion of active sovereignty . . . ." *Id.* at 290. *See also id.* No. 32, at 198 (A. Hamilton).

The existing republican forms of government continued by the States are guaranteed. *Id.* No. 43, at 275 (J. Madison). "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter." *Id.*

We must remember that the division of power in "the compound republic of America" is "a double security" for the rights of the people. *Id.* No. 51, at 323 (J. Madison).

Accordingly, it is well established that " '[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' " *Sugarman et al. v. Dougall*, 413 U.S. 634, 647 (1973).

> And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy

> perform functions that go to the heart of representative government.

Id.

There are fundamental limitations, moreover, on the powers of federal courts "to restructure the operation of local and state governmental entities." *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976). Nor may the Constitutional guaranties, including that of a republican form of government (Art. IV, § 4), " 'be manipulated out of existence.' " *See Kelley v. Metropolitan County Board of Education*, 836 F.2d 986, 997 (6th Cir. 1987), *reh'g denied* (1988), *cert. denied*, 487 U.S. 1206 (1988).

This applies with special force to the right of the people to constitute an independent state judiciary.

> The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice, within each state, according to its laws, on all subjects not entrusted to the federal government . . . . [are] the peculiar and exclusive provence and duty of the State Legislatures.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798).

Our constitutional system recognizes that "a separate and independent judiciary is an indispensable element of a republican form of government." *See Bauers v. Heisel*, 361 F.2d 581, 588 (3d Cir. 1965), *cert. denied*, 386 U.S. 1021 (1967). The National Government, at least in the absence of extraordinary circumstances not present here, may not " 'prevent a state from discharging its ordinary functions of government.' " *United States v. Downey*, 195 F.Supp. 581, 585 (S.D. Ill. 1961). This includes the functions of state courts. *Id.*

The situation of a Superior Court Judge, then, is a far cry from that of the game warden involved in *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983). Even in *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 556 (1985), the Court recognized that there might be "affirmative limits [which] the constitutional structure might impose on federal action affecting the States under the Commerce Clause." It did not

have to define those in that case. The Court cited, however, *Coyle v. Oklahoma*, 221 U.S. 559 (1911). That case recognized that states were " 'endowed with all the functions essential to separate and independent existence.' " *Id.* at 580.

In *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court upheld a Congressional bar on unregistered state and local bonds, stating: "Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." However, the federal law in that case had only "a *de minimis* impact on the States" and did not substantively restrict their ability to raise funds. *Id.* at 1370. (Rehnquist, C.J., concurring).

The Court in *South Carolina* did not completely foreclose the possibility that "the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." *Id.* at 1361. The decision cited for this, *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 (1982), recognized that "having the power to make decisions and to set policy is what gives the State its sovereign nature." Requiring states to restructure their constitutional method for selecting their judiciary by converting to elections raises the most serious questions under the Constitutional balance. The same is true for virtually compelling states to replace uniform judicial retirement policies with stigmatizing, self-defeating removal investigations and hearings.

B. THE LACK OF A CLEAR CONGRESSIONAL PREEMPTION STATEMENT, THE FEDERAL-STATE BALANCE AND THE LEGISLATIVE HISTORY ALL INDICATE THAT THE STATE JUDICIARY PROVISIONS NOT BE STRICKEN.

1. Congress Must Have Clearly Stated Its Intent To Exercise Its Commerce Clause Power Fully And To Preempt State Laws Before It Will Be Presumed To Have Done So.

Commerce clause legislation must be consistent with the Bill of Rights. *Tribe, supra*, § 5-8, at 316. "Moreover, congressional exercises of the commerce power trigger a judicial

approach to statutory construction which reinforces the political checks of pluralism and federalism . . . ." *Id.* "A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full." *Id.* (Emphasis by Tribe).

The Supreme Court has held that " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.' " *Heublein, Inc. v. South Carolina Tax Comm'n.*, 409 U.S. 275, 281-82 (1972), quoting *United States v. Bass*, 404 U.S. 336, 349 (1971). Nor will Congress be deemed to have authorized its delegates to do so either. *Bowen v. American Hosp. Assn.*, 476 U.S. 610, 644 (1986). This is not a case where otherwise the purpose of the act would be defeated. *See id.* We are only dealing with judges.

As the Court also noted in *Bowen:*

> "Where Congress has not clearly indicated a purpose to precipitate conflict [between federal agencies and state authority] we should be reluctant to do so by decision." (footnote omitted) . . . "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous."

Id. at n.33. (Citations omitted.)

These principles apply with special force to preemption. There is "an overriding reluctance to infer preemption in ambiguous cases." Tribe, *supra*, § 6-25, at 479. The exercise of federal supremacy is not lightly presumed. *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 522 (1981). It is a "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Furthermore,

> When Congress legislates in a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

California v. ARC America Corp., ___ U.S. ___, 109 S.Ct. 1661, 1665 (1989) (citation omitted).

Here, too, we are in a traditional state area. In *Malmed*, the Court recognized that about half the states had maximum age retirement provisions for judges, with 70 years the most common. 621 F.2d at 586.

Upholding another matter of state traditional regulation, a wage protection law, this Court recently stated:

> Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co. v. Coyne*, 482 U.S., at 19, 107 S.Ct. at 2221.

Massachusetts v. Morash, ___ U.S. ___, 109 S.Ct. 1668, 1675 (1989). *Cf. Dellmuth v. Muth*, ___ U.S. ___, 109 S.Ct. 2397, 2400 (1989) (" 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.' ").

Furthermore, " 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.' " *Public Citizen v. United States Dept. of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2572 (1989).

These considerations are most important, for the Second Circuit, in a case relied on by petitioners, acknowledged that "the meaning of this part of the definition [the very one in question] is not entirely clear . . . ." *E.E.O.C. v. State of Vermont*, 904 F.2d 794, 797 (2d Cir. 1990).

Petitioners themselves, moreover, admit that the policymaking level exemption is "capable of differing shades of meaning." Petitioners' Brief, p. 17.

2. The Policymaking Level Exemption Is A Separate One Which Must Be Given Meaningful Effect.

Petitioners claim that the policymaking level exemption of 29 U.S.C. § 630(f) is merely a "sandwiched" one which should be limited only to those who have an extremely close working relationship with an elected official. Pet. Brief, p. 17. *See also Vermont*, 904 F.2d at 798.

The difficulty with this assertion, first, is that it would exempt an immediate but subordinate advisor in respect to constitutional or legal powers, but not the independent judge who decides those powers.

It would also exempt relatively low level positions such as the personal staff or immediate advisor to a Probate Judge, City Treasurer, Town Clerk or Registrar of Voters — all of whom can be or are elected in Connecticut — but not the Superior Court, a constitutionally established court of general jurisdiction which exercises the judicial power of the State.

Congress presumably did not intend to produce such unreasonable results or absurd laws. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 677 (2d Cir. 1985); 2A Sutherland, *Statutes and Statutory Construction* § 45.12 (4th ed. 1984).

The First Circuit correctly rejected a claim similar to petitioners', stating:

> The Commission also argues that to fit within the third exception to the definition, the appointees must be "an elected official's first line advisers." This argument rests in part on the Commission's apparently unintentional misreading of the [Title VII] conference managers' report. The report actually reads:
>
> > It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisers *or* to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees' intent that this exemption shall be construed narrowly.
>
> Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., reprinted in part in 1972 U.S. Code Cong. & Admin. News 2137, 2179, 2180 (1972). The underlined "or," originally omitted by the appellant, makes it clear that Congress intended two categories: policymakers, who need not be advisers; and advisers, who need not be policymakers.

Massachusetts, 858 F.2d at 55-56 (emphasis by the Court).

As the Court also recognized:

> Each judge, once appointed, and no matter how lowly, is expected to act independently from his or her appointer. This difference does not act to preclude application of the "policymaker" exception to the judiciary, it simply calls for a slightly different understanding of who is a policymaker for purposes of the exception. *Id.* at 56.

It is also significant that the Conference Report, quoted by the Court, *supra*, did *not* "sandwich" this exemption between the other two.

Although the Conference Report did refer to an example of a policymaking position "such as cabinet officers," this was illustrative, and not restrictive by its own language.

The extension of policymaking to positions of "comparable responsibilities at the local level" shows how irregular it would be to exempt a town public works or parks and recreation director, for example, but not a State Superior Court Judge who exercises the powers of a state-wide constitutional court of general jurisdiction.

In addition, a State Commissioner of Economic Development, for example, who is appointed by the Governor, serves at his or her pleasure and whose policies he or she executes is exempt. A Superior Court Judge, however, who has com-

plete judicial independence, who can invalidate unlawful executive action, and whose decisions are reversible only on appeal would not be exempt, under Petitioner's reading. This would also be an absurd result.

The First Circuit also ruled:

> [T]he narrow construction mentioned by the conferees, on which the appellant's brief relies so heavily, is clearly intended to limit the reach of the exception down the chain of command, and not so much across agencies or departments. This is evident from the very language of the conferees, who placed no restrictions on the number of agencies or departments covered, but limited the positions covered to those at the highest levels. Clearly, each judge, as a separate and independent judicial officer, is at the very top of his particular "policymaking" chain of command, responding, if we can call it that, only to a higher appellate court.

Id. at 56.

3. The Title VII Legislative History Made Clear References To State Judges, Elected *Or* Appointed.

The Second Circuit, moreover, was incorrect in stating that with the exception of one earlier reference in the Title VII history, "the judiciary was never mentioned again, and there was no discussion indicating that Congress intended to place appointed judges in the excluded category of policymakers." 904 F.2d at 800.

Senator Ervin, who with Senator Allen later offered the amendment which dealt with the State Officer exception, stated:

> There is not even an exception in the [unamended] bill to the effect that the EEOC will not have jurisdiction over the Governor of a State or the Lieutenant Governor of a State, or both; statewide election officials; *State judges, whether they are elected or appointed to office;* clerks of superior courts of counties and their assistants; sheriffs of counties or their assistants; and the chiefs of police of municipalities. The bill would give the EEOC jurisdiction, even, over members of school boards, *certainly where they are appointed.*

118 Cong. Rec. 1677 (1972) (emphasis added).

Although he referred to State "supreme court justices" as also being subject to the bill, *id.* at 1838, 4096, he did not limit his remarks to them. He criticized giving the EEOC "the ultimate power to determine who a State *or a political subdivision* of a State can appoint or employ to exercise the legislative, executive, and *judicial powers* of a State." *Id.* at 1677 (emphasis added). This would refer to local appointment of municipal judges, for example.

He asked whether the bill included "the supreme court justices of the State" *and* the "other men who exercise executive and judicial power." *Id.* at 1811.

He further asked if "the bill in its present form would give Federal district courts the ultimate power to compel States and subdivisions of States to yield to their decrees with respect to the employment of persons who exercise the legislative, executive, *and judicial powers* of the States *and* political subdivisions of States?" *Id.* at 1838 (emphasis added).

Senator Taft, who was a member of the Senate Labor and Public Welfare Committee which had reported out the bill, stated that he did not intend to include elected officers, and that he "would be quite willing to go considerably further and perhaps to cover other personnel as well, and to cover those at the top decisionmaking levels in the executive *and* judicial branch as well." *Id.* (emphasis added).

Senator Ervin then offered several amendments, one of which, also cosponsored by Senator Allen, was adopted with modifications. It exempted elected officials, persons they chose as personal assistants and their immediate advisors concerning constitutional or legal powers. Amendment No. 888, *id.* at 4095, 4493.

It did not contain the present exemption at issue, i.e., "an appointee on the policymaking level."

The amendment would include members of a Governor's cabinet. *Id.* at 4493. (Discussion by Senators Williams, Ervin and Javits). The Ervin-Allen amendment (No. 888) as modified was then adopted — still without the phrase, "appointee on the policymaking level." *See id.* at 4493, 4494. The bill then passed the Senate with this amendment. *See id.*

The House bill, however, had not expanded the coverage of Title VII. *See* 1972 U.S. Code Cong. & Admin. News, *supra* p. 15, at 2180. The House receded with an amendment that added an exemption. As Congressman Erlenborn, one of the House Managers, stated:

> In the other body, an exemption was made for elected officials and immediate legal advisers. In the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policymaking positions.

118 Cong. Rec. at 7567. Congressman Perkins, who called up the conference report, stated that the conference exempted "elected officials and persons chosen by such officials to work on their personal staffs, *as well as* appointees to policymaking positions at the highest level of the department or agency of the State or local government." *Id.* at 7563 (emphasis added).

He stated that the intention was to exclude cabinet members and persons with comparable local responsibilities. *Id.* However, the conference report itself, while mentioning these positions, is not limited to them. *See* 1972 U.S. Code & Admin. News, *supra* p. 15, at 2180.

Furthermore, the Ervin-Allen Amendment — without the policymaking level appointee exemption — was already deemed to cover cabinet members. *See* 118 Cong. Rec. 4493. Therefore, it is a reasonable inference that the latter exemption, added in the conference, while including cabinet members, was by no means restricted to them. Statutes are not presumed to be superfluous. *United States v. Blasius*, 397 F.2d 203, 207 (2d Cir. 1968), *cert. denied*, 393 U.S. 1008 (1969).

"[S]uccessive drafts or amendments" may be compared to ascertain legislative intent. *Wright v. Vinton Branch, etc.*, 300 U.S. 440, 463 n.8 (1937).

4. The Legislative History Further Shows That The Exemption Is Not Limited To Supreme Court Justices But Also Includes Other Persons Who Exercise Judicial Power.

Although the Title VII legislative history mentioned Supreme Court Justices, it was not limited to them.

Senator Ervin, in referring to the original bill before the exemption was added, asked a number of questions, including:

> Mr. President, as was pointed out in the last letter I read, there is nothing in the bill that clarifies who is a State employee or an employee of a local political subdivision of a State. Does it include the Governor of the State? Does it include the supreme court justices of the State? Does it include the members of the State legislature? Does it include all those elected sheriffs in the various counties? Does it include the various clerks of the court *and other men who exercise executive and judicial power?*

118 Cong. Rec. 1811 (emphasis added).

Sen. Ervin, furthermore, discussed "State judges, whether they are elected *or* appointed to office" and even "clerks of superior courts of counties and their assistants." *Id.* at 1677 (emphasis added). He also cited "persons who exercise the legislative, executive and judicial powers of the States *and* political subdivisions of States." *Id.* at 1838 (emphasis added). This would include local judges of only limited jurisdiction. *See also id.* at 1677, referring to appointments of those exercising judicial powers by political subdivisions of States.

It would be aberrant to exempt a municipal judge of only restricted authority or a staff member who merely advises as to constitutional or legal powers — while not exempting the constitutional court of original and general jurisdiction

which actually decides those powers. " '[W]e cannot attribute to Congress the intention to . . . open the door to such obvious incongruities . . . .' " *Metropolitan Edison v. People vs. Nuclear Energy*, 460 U.S. 766, 776 (1983). Congress presumably did not intend its laws to be absurd. *See United States v. Turkette*, 452 U.S. 576, 580 (1981); 2A Sutherland, *supra* p. 14.

As the Court of Appeals stated:

> We believe it is highly unlikely that Congress intended this result, [exempting elected judges but not appointed ones] and the implausibility of the total exclusion of the appointed members of the state judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, weighs heavily against such a narrow reading of the policymaking level exception. *See EEOC v. Massachusetts*, 680 F. Supp. at 460-61.

898 F.2d at 602.

C. JUDGES ARE AT THE JUDICIAL POLICYMAKING LEVEL OF GOVERNMENT.

As the First Circuit recognized:

> This judicial type of policymaking is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decisionmaking, and the same kind of forward thinking that is required of "appointees on the policymaking level" in those other two branches of government. And it certainly concerns state government to a similar degree.

858 F.2d at 55.

Policy includes "the art or science of government: the conduct of public affairs." *Webster's Third New International Dictionary* 1754 (1961). It also includes "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in

the light of given conditions to guide and usu. determine present and future decisions." *Id.*

That is exactly what courts of all levels do. They formulate judicial policy. "Many decisions of this Court . . . have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' " *United States v. Nixon*, 418 U.S. 683, 703 (1974).

Furthermore, the three branches of government are not entirely separate and distinct. There is a certain degree of overlapping responsibility, "a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.' " *Mistretta v. United States*, ___ U.S. ___, 109 S.Ct. 647 at 659 (1989).

The judiciary has inherent power to develop new equitable remedies for new problems, and "while it must adhere to the law, the Court can pursue remedies that it believes will best effectuate existing public policy." Judge John M. Walker, Jr., *Decisionmaking in Government: A Personal Perspective*, 36 Fed. Bar J. 333, 334 (1989). "Determining a sentence that will serve the ends of justice and meet community needs is a matter of pure judgment. No staff of experts could possibly calculate a 'correct' answer in such a situation." *Id.* at 335.

It has been said that "[o]ur entire body of what is described as the 'common law' is the resultant of innumerable court decisions, based upon the judicial notions of sound social policy and human welfare." 6A A. Corbin, *Corbin on Contracts* § 1375 at 18 (1962). *See generally, id.* at 10-19. Holmes stated that:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and

> at bottom the result of more or less definitely understood views of *public policy;* most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

O.W. Holmes, Jr., *The Common Law* 35-36 (1881). (Emphasis added.) *See also id.* at 30, 181, 198.

It is simply too late in the day to ignore the unique role of judicial policy in our country's history.

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.

Law Is Justice, Notable Opinions of Mr. Justice Cardozo 428 (A. Sainer ed. 1938), quoting B. Cardozo, *The Nature of the Judicial Process* 112 (1922); *see generally, Law Is Justice, supra,* 427-429. "In the case at bar, also, the logic of the words should yield to the logic of realities." *The Social and Economic Views of Mr. Justice Brandeis* 333 (A. Lief ed. 1930), quoting dissent in *DiSanto v. Pennsylvania,* 273 U.S. 34, 43 (1927).

The enforcement of restrictive social covenants "is contrary to the public policy of the United States . . . ." *Hurd v. Hodge,* 334 U.S. 24, 34, 35 (1948). " '[A]ny relief can be fashioned in the light of well-known principles of equity.' " *Reynolds v. Sims,* 377 U.S. 533, 585 (1964). "The public policy to be applied is the public policy of the present time. The changing conditions of life [determine] . . . whether the public interest requires that a restrictive stipulation shall be deemed void as against public policy." *Samuel Stores, Inc. v. Abrams,* 94 Conn. 248, 252 (1919). The grounds for illegality of an agreement include "the often vague dictates of

public policy." *May Dept. Stores Co. v. First Hartford Corp.,* 435 F.Supp. 849, 852 (D. Conn. 1977).

The practice of the U.S. Supreme Court itself is "one of judicial policy." *Metropolitan Water Dist. v. Adams,* 19 Cal.2d 463, 122 P.2d 257, 263 (1942).

Judicial policy takes many forms. For example: "We recognize that stare decisis embodies an important social policy . . . . But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . . ." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940).

The role of judicial policy is even greater with state courts.

> Although it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition, it remains true that federal courts, *unlike their state counterparts,* are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981) (emphasis added) (citation omitted).

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 312 (1981).

As Justice Cardozo stated: "The choice for any state [as to the effect of precedent] may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Great Northern Railway v. Sunburst Co.,* 287 U.S. 358, 365 (1932).

The Second Circuit itself recognized that there are times when courts "must determine what legal principles apply when there is a lacuna in the law or determine how seemingly conflicting legal principles are to be reconciled." *Vermont,* 904 F.2d at 800.

These considerations apply to tribunals such as the Connecticut Superior Court, which is a constitutional court of general jurisdiction. *See Adams v. Rubinow*, 157 Conn. 150, 155-56 (1968).

First, the Superior Court has inherent rule-making power, irrespective of legislation. 1 Conn. Pract. Bk., §§ 1, 7; *Heilberger v. Clark*, 148 Conn. 177, 185 (1961).

In referring to a case involving judicial rule-making power, this Court stated that "having the power to make decisions and to set policy is what gives the State its sovereign nature." *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 761 (1982), citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977).

The latter decision recognized that "the rules are subject to pointed re-examination by the *policymaker* — the Arizona Supreme Court . . ." *Bates*, 433 U.S. at 362. (Emphasis added.)

In Connecticut, moreover, the rules are issued by the Superior Court, not simply by Supreme Court Justices. 1 Conn. Pract. Bk., § 7.

Wholly apart from rule-making, furthermore, "trial courts have decided difficult constitutional issues with initiative and courage rather than reserving them to the supreme court . . ." Judge Robert Satter and S. Geballe, *Litigation Under the Connecticut Constitution — Developing a Sound Jurisprudence*, 15 Conn. L.R. 57, 59 (1982). "Vigor and creativity in the development of the law is [shown] at the trial court level . . ." *Id.* at 66. These decisions can significantly influence Supreme Court opinions and provide that Court the benefit of the Superior Court's reasoning. *See id.* at 81. The coauthor, Judge Satter, is the plaintiff in the Connecticut ADEA case.

In fact, for the Superior Court *not* to consider the constitutionality of a statute is error. *Commissioner of Welfare v. Rynecki*, 37 Conn. Sup. 560, 561-62 (Super. Ct. App. Sess. 1981). As a court of general jurisdiction, it must do so. *See also State Management Assn. of Connecticut v. O'Neill*, 40 Conn. Sup. 381, 384-85 (1986), *aff'd*, 204 Conn. 746 (1987).

Although a Superior Court decision may be reversed on appeal, the same is also true for that of a cabinet member, whose action can be overturned with far less formality, yet who is exempt from the ADEA. *See* 904 F.2d at 800.

Furthermore, appellate review in general must be seen as a rather weak and indirect instrument of control. Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442, 1445 (1983).

In summary, the Superior Court has a supreme jurisdiction original and appellate over the trial of all causes not committed to the jurisdiction of inferior courts. *Styles v. Tyler*, 64 Conn. 432, 450 (1894). Judge [later Chief Justice] John P. Cotter stated:

> Since 1711, the Superior Court has been the highest court of original trial jurisdiction. To me, it is the foundation of the administration, the profession and practice of the law; it is the bulwark of our law and, throughout the country, the highest court of original jurisdiction is the cornerstone of the judicial department *and the most important court in a state* . . .

Hon. J.P. Cotter, *The Constitutional Court*, 34 Conn. Bar J. 91, 95 (1960) (emphasis added).

> Clearly, each judge, as a separate and independent judicial officer, is at the very top of his particular "policymaking" chain of command, responding, if we can call it that, only to a higher appellate court.

E.E.O.C. v. Commonwealth of Mass., 858 F.2d at 56.

II. PETITIONERS CANNOT PROVE THAT THE JUDICIAL TENURE PROVISION LACKS A RATIONAL BASIS AND DENIES EQUAL PROTECTION.

Petitioners acknowledge that age is not a suspect class. Pet. Brief, p. 28.

The Second Circuit itself has held that maximum age limitations for state inferior court judges are reasonable. *Rubino v. Ghezzi*, 512 F.2d 431, 433 (2d Cir. 1975) (per curiam),

cert. denied, 423 U.S. 891 (1975). As the New York Court of Appeals ruled:

> The mandatory retirement age limitation for State Judges is rationally related to the promotion of any or all of the following State interests: (1) advancement of general considerations of judicial efficiency (*Rubino v. Ghezzi*, 2nd Cir., 512 F.2d 431, 433, *cert. den.* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122); (2) motivation and encouragement of qualified, younger attorneys with judicial aspirations, by this orderly process of attrition (*Rubino v. Ghezzi, supra; Vance v. Bradley*, 440 U.S. 93, 100, 99 S.Ct. 939, 944, 59 L.Ed. 2d 171, *supra*); (3) elimination of the unpleasantness and embarrassment of selectively removing aged and disabled Judges (*Malmed v. Thornburgh*, 3rd Cir., 621 F.2d 565, 572, *cert. den.* 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219); (4) prevention of harm by a few disabled Judges which more than offsets loss of Judges who retain full powers past age 70 (*Malmed v. Thornburgh, supra*); (5) elimination of the administrative burden of testing each Judge attaining the age of 70 to assess competency; (6) avoidance of the economic burden of testing and removing incapable Judges; and (7) the fixing of a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber Judges in the system (*O'Neill v. Baine*, 568 S.W. 2d 761 [Mo]). The challenged provisions mandating retirement at the end of the year in which age 70 is reached manifestly have a rational basis.

Maresca et al. v. Cuomo, et al., 64 N.Y.2d 242, 475 N.E. 2d 95, 99 (1984), *appeal dismissed*, 474 U.S. 802 (1985).

In fact, there are maximum age limits of 64 for appointment *and* 70 for retention for Chief Judges of both the U.S. Courts of Appeal and District Courts. 28 U.S.C.A. §§ 45(a)(1)(A) and 3(C) and § 136(a)(1)(A) and 3(C).

In the Connecticut case, furthermore, the Chief Court Administrator testified as to his experience in dealing with infirmities of judges:

> With respect to judges, and by definition these are individuals under 70, I have had only rare occasions to be concerned about their infirmities — and I'm not speaking about physical infirmities at this point — and there are approximate 160 judges of the Superior Court, including senior judges, there are approximately 39 working referees [i.e., retired judges over age 70] and I have had more occasion to have to intervene with respect to those individuals than the other category. App., 24A.

III. FINAL CONSIDERATIONS CONCERNING STATE SELF-GOVERNMENT.

Traditional and essential state interests are not to be undercut by mere Congressional vagueness. *Garcia* presumes that the inherent restraints of the national political process "ensures that laws that unduly burden the States will not be promulgated." 469 U.S. at 556. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, *supra*, § 6-25, at 480 (emphasis by Tribe).

It follows from *Garcia* and *Baker* that any Congressional decision impairing state self-government must be made deliberately and explicitly by Congress itself. It is not to be made by an administrative agency, however well-intentioned, to which the Court then defers. That is not the work of the national *political* process in which the states participate. *See Garcia*, 469 U.S. at 556-57.

This case goes to the heart of state self-government. This includes internal state activities and institutional organization which should be safeguarded. *See* Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 105 (1985). "[E]ssentially internal state activities" should be protected. *Id.* "Such

internal matters would include the organization of state and local governments . . . ." *Id.* at 105.

> Even prior to *National League of Cities*, there was authority that the Court could step in to prevent the destruction of states. Opponents and supporters of *National League of Cities* alike have endorsed this view of the judicial role in protecting the states. *Id.* at 112.

"[T]he real business of preserving federalism" is "protecting the structure of state government from federal intrusion." L. Tribe, *supra*, § 5-22, at 396. The "tacit postulates" of federalism ensure that the existence of states is a meaningful one. *Id.* at 397. The present issue may not involve a frontal attack on that existence. It does, however, concern "a gradual chipping away at state authority" which can be insidious. *See* Field, *supra*, 99 Harv. L.R. at 112 and *id.* at n.145.

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.

L. Tribe, *supra*, § 5-20, at 381.

The most fundamental threats to federalism come from national edicts which "*restructure* the basic institutional design of the system a state's people choose for governing themselves." L. Tribe, *supra*, § 5-23, at 397.

The policies of "Our Federalism," which include a dual judicial system, should not be eroded. *See Younger v. Harris*, 401 U.S. 37, 41, 44 (1971); *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Engineers*, 398 U.S. 281, 285-86 (1970). "It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Younger*, 401 U.S. at 44-45 (Black, J.).

CONCLUSION

IT IS THEREFORE respectfully submitted that the decision below should be affirmed.

Respectfully submitted.

STATE OF CONNECTICUT,
AMICUS CURIAE IN SUPPORT
OF RESPONDENTS

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No. 90-50

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR., AND
ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE
STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX OF AMICUS CURIAE STATE OF CONNECTICUT

(EXCERPTS FROM TRANSCRIPT OF HEARING NOVEMBER 8, 1990)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT SATTER and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
Plaintiffs,	:	
vs.	:	CIVIL H-89-525 (JAC)
THE CONNECTICUT JUDICIAL DEPARTMENT, ELLEN PETERS and AARON MENT,	:	
Defendants.	:	
		NOVEMBER 8, 1990
		NEW HAVEN, CONNECTICUT

B E F O R E :

HON. JOSE A. CABRANES, U.S.D.J.

A p p e a r a n c e s :

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Appearances (Continued):

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Paul Collard
Official Court Reporter.

THE COURT: We have a hearing this afternoon in Robert Satter and the Equal Employment Opportunity Commission vs. The Connecticut Judicial Department, Ellen Peters, in her official capacity, and Aaron Ment, in his official capacity, Civil Action Number H-89-525(JAC).

I note also that fourteen Connecticut State Trial Referees have been granted permission to appear as amici curiae.

* * * *

Let me briefly state what I believe to be the procedural posture of this case:

On August 15, 1989 the court entered a temporary restraining order enjoining the defendants from removing the plaintiff from his office as a senior judge of the Connecticut Superior Court and from depriving him of his powers and duties as a senior judge at the time that he reaches 70 years of age.

Judge Satter turned 70 four days later — that is, on August 19, 1989.

On September 21, 1989, I granted a motion to stay these proceedings and to extend the temporary restraining order until further order of the court pending the Court of Appeals' decision in a case called Equal Employment Opportunity Commission versus State of Vermont. That case raised similar or arguably similar issues concerning the applicability of the Age Discrimination in Employment Act of 1967 to state court judges required by their state constitution to retire when they reach the age of 70.

The decision in State of Vermont came down on May 21, 1990, and is now published at 904 F.2d 794.

The Court of Appeals held that Vermont's appointed judges were employees within the meaning of the Age Discrimination in Employment Act and were therefore entitled to the Act's protection, even against the clear language of the Vermont state constitution.

At a status conference on August 24, 1990, we agreed to let stand the temporary restraining order until we could schedule a hearing on the permanent injunction sought by the plaintiff in his complaint.

This is, as I understand it, the purpose of the hearing today.

* * * *

MR. GOULD: Then I believe the plaintiffs have one witness.

THE COURT: That's fine.

* * * *

Fine. Let's hear, then, from the first witness.

MR. GOULD: We call the plaintiff, Robert Satter.

ROBERT SATTER, called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Please be seated.

Would you please state your name and spell your last name?

THE WITNESS: Robert Satter, S-a-t-t-e-r.

THE CLERK: And your address, please?

THE WITNESS: 339 Stanley Drive, Glastonbury, Connecticut.

DIRECT EXAMINATION

BY MR. GOULD:

Q Judge Satter, could you tell us what position you presently hold with the State of Connecticut or the Connecticut Judicial Department?

A Senior Judge of Superior Court.

Q And could you briefly describe whether in holding that position you have any administrative duties?

A No.

Q You have none?

A I have none. I have one — I don't think it's administrative duty; I'm chairman of a committee that oversees the printing of trial court opinions, but that's all.

THE COURT: Hold on one second.

Judge Satter, could you adjust the microphone and perhaps your push chair right in and speak into the microphone?

Thank you.

Go ahead, Mr. Gould.

MR. GOULD: I really have nothing further, your Honor. I believe everything else is contained in our Stipulations of Facts and sets forth our case, and I merely want it to end at that.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. SCHAEFER:

Q Judge Satter, I didn't — You'll excuse me, but I didn't quite hear the answer to the last question. And could you just briefly tell us what you do in chairing that committee?

A Well, I'm chairman of a committee that oversees the printing of trial court opinions, publishing of trial court opinions. In that regard, trial judges send me opinions, which I have a committee of state referees, and I ask them to peer review the committees and send their evaluations directly to the reporter, the law reporter who publishes them when they can be published.

Q And your committee deals with opinions of the Superior Court, am I correct?

A Yes.

Q And your committee decides which of those opinions should be published?

A Yes. I send them — it isn't really a committee. I send it out to state trial referees and ask them to evaluate them. If they approve them, if the trial referee approves them, his evaluation is sent to the reporter, and when there's space they're published in the supplement.

Q -And the purpose of the committee is to decide which of these opinions should be published, is that correct?

A Yes.

MR. SCHAEFER: Thank you.

No further questions, your Honor.

MR. GOULD: I have nothing further, your Honor.

THE COURT: Are there any questions that counsel would wish to put to Judge Satter regarding the issue raised by amici curiae regarding the assertedly unique character of the judicial system of Connecticut?

MS. EMMETT: Your Honor.

THE COURT: Perhaps Ms. Emmett could do that.

MS. EMMETT: Thank you.

THE COURT: And we'll permit her to do that, absent objection.

MS. EMMETT: Thank you, your Honor.

I think most of the arguments in our memorandum are covered by the Connecticut statutes, constitution, case law and stipulation which has been entered here, but there is one thing which I would like to ask Judge Satter, if I might, and that is:

CROSS-EXAMINATION

BY MS. EMMETT:

Q Judge Satter, it's my understanding that you have retired from the Superior Court bench at this time, is that right?

A I'm a senior judge. Yes. Somebody took my place, yes.

Q Right. But in the summer of 1988 you did retire voluntarily from the bench, is that right?

A Yes.

Q All right. And there's nothing further that you need to do at this point in order to become, if you will, more retired, is there?

MR. GOULD: I'd have to object to that question, your Honor.

MS. EMMETT: It may not be a comprehensible question. Perhaps I should rephrase it.

Q But what I'm driving at is that there's no further official action that you need to take at this point to cease working for the Judicial Department, is there?

A I think it's the other way around. I can exercise the right to work. As a senior judge, I have the right to work as a Superior Court judge.

Q That's correct. I don't disagree with you.

But my question is something else. That you are retired at this point, but you do have the opportunity to work, is that right?

THE COURT: You mean as a senior judge?

MS. EMMETT: As a senior judge, yes.

A I work as a senior judge.

BY MS. EMMETT:

Q All right. I guess I may not be able to ask this question to get an answer that I would like to get, but my point is

that there is no more retired status than you currently have available in the Judicial Department, is that right?

A I don't know what that means. I mean —

THE COURT: Can I ask a question, and it may reflect a certain ignorance on my part, so bear with me.

Judge Satter, why, in your view, would it be preferable to be a senior judge indefinitely, than to become a trial referee?

THE WITNESS: Well, the powers of a senior judge are equivalent to that or equal to that of a Superior Court judge. There's no limitation on the powers of a senior judge, subject only to his willingness to undertake them.

A state trial referee has certain limited powers. He can't try a civil jury case without the permission of the attorneys, he can't hear criminal matters, and, I don't know, the statute sets forth the other distinctions.

MS. EMMETT: I do not have any further questions. Thank you.

THE COURT: Any other questions, Mr. Gould?

MR. GOULD: Nothing further, your Honor. I think it's all been out.

THE COURT: Counsel for the EEOC?

MR. GRAZIANO: No questions, your Honor.

THE COURT: Mr. Schaefer, any questions for Judge Satter before we excuse him?

MR. SCHAEFER: Yes. Just one second, if the Court would just bear with me?

THE COURT: Yes.

(Pause)

BY MR. SCHAEFER:

Q Excuse me, Judge Satter. You said that, and please correct me if I'm wrong, that you, as a state trial referee, could not hear a civil jury case without the consent of the parties and that's one of the limitations, is that correct?

A Yes.

Q All right. But a senior judge, or for that matter a regular Superior Court judge, couldn't hear a civil jury case at all if he was assigned to another division such as Criminal, is that correct?

A Sure, wherever I'm assigned I take that case.

Q Right. But whether one could hear a civil jury case with or without the consent of the parties requires one to be assigned to hear civil jury cases in the first place, isn't it?

A Yes.

MR. SCHAEFER: Thank you.

THE COURT: Any other questions? Ms. Emmett?

MS. EMMETT: Your Honor, I believe that Mr. Schaefer just asked a question that I was going to ask. Thank you.

THE COURT: Anyone else?

Absent objection or further comment, Judge Satter may step down.

(Witness excused).

MR. GOULD: Thank you, your Honor.

THE COURT: Any other witnesses for the plaintiffs?

MR. GOULD: No. In fact, your Honor, we will rest under the assumption that the agreements that we made in the attorneys' lounge before we came in today on the stipulations of fact are the ones that are going to be entered in the record and signed by all parties.

* * * *

MR. GOULD: The plaintiffs have rested our case in chief. We have no testimony further.

THE COURT: Mr. Schaefer?

MR. SCHAEFER: Yes, your Honor.

We would like to call the Chief Court Administrator to go into some of the matters that have been recognized in other decisions that we felt were not adequately dealt with or perhaps not fully appreciated in the Second Circuit's decision.

So with the permission of the Court, I'd like to call Judge Ment, please.

A A R O N M E N T, called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Please be seated.

THE WITNESS: Thank you.

THE CLERK: Would you please state your name and spell your last name?

THE WITNESS: Aaron, A-a-r-o-n, Ment, M-e-n-t.

THE CLERK: And your address, please?

THE WITNESS: 15 Stoneleigh Road, Fairfield, Connecticut 06432.

DIRECT EXAMINATION

BY MR. SCHAEFER:

Q Judge Ment, you're the Chief Court Administrator of the State of Connecticut?

A Yes.

Q And could you just briefly tell us what you do as Chief Court Administrator?

A My responsibilities are to oversee the day-to-day administration of the Department, including the assignment of judges and the general administration of the Judicial Department.

Q And when were you appointed?

A 1984.

Q And you were appointed by the Chief Justice at that time?

A By Chief Justice Speziale. I serve at the pleasure of the Chief Justice.

I was later re-appointed by Chief Justice Ellen A. Peters.

Q And could you tell us just a little bit about your prior government service?

A I began service in the legislature as an aide to then Speaker Testo, followed by being counsel to Speaker Ratchford for two terms, counsel to the Minority Leader Carl Ajello for one term, counsel to Governor Grasso for two years, and then appointed to the bench.

Q And which courts did you serve on prior to becoming Chief Court Administrator?

A Court of Common Pleas and Superior Court.

Q And the approximate time periods?

A Common Pleas was from 1976 to 1978.

1978 to 1984 on the bench of the Superior Court.

Since 1984 continuing as a Superior Court Judge, but serving as Chief Court Administrator.

Q And between those two courts could you just tell us generally what kind of cases you handle?

A Principally, I sat on criminal cases, but I sat on all cases — excluding Housing.

Q And you're familiar with the demands those cases make on a judge?

A Yes.

Q Now, as Chief Court Administrator do you deal with other Superior Court judges?

A I have certain statutory responsibilities: assignments, admonishments, I also have all other duties corresponding to that of any administrator.

In addition, I am the principal individual who is involved in the judicial performance evaluation, which is an evaluating procedure for all Superior Court judges.

Q And do you have any dealings with the Judicial Review Council?

A I deal with the Judicial Review Council relatively often.

Q Okay. And I know this is set forth in the statutes and we can refer to this in the brief, and I'm sure his Honor is generally aware of it, but just briefly could you tell us what that agency does?

A The Judicial Review Council is a council that is a disciplinary council, it's an executive branch of government council that disciplines judges when necessary, and also is the body that would determine medical retirements.

Q Now, do you also deal with state referees?

A Yes.

Q And could you please tell us about that also?

A My principal responsibility with respect to referees is in the re-designation of referees. Referees must be designated by the Chief Justice each year as a trial referee. Therefore, there is a procedure which she has put in place which places me responsible for the gathering of information each year as to each referee.

Q And, generally, do you know what state trial referees do?

A Yes.

Q And what do they do?

A State referees generally handle non-jury matters that are not of a criminal nature. They do handle jury matters, of course, with consent of counsel.

THE COURT: Can I just inquire, Judge Ment?

THE WITNESS: Yes, Judge.

THE COURT: Do I understand, therefore, that if one were a senior judge, one would not have to be reviewed by your office and the office of the Chief Justice, is that right?

THE WITNESS: No, that's not correct, Judge Cabranes.

Senior judges sit with a less formal review, but they sit only if assigned by me. In a way that the Chief Justice designates trial referees, I have some responsibility with respect to senior judges.

Senior judges really sit by agreement. We agree, the senior judge and I agree as to assignment. If under the statute I feel a judge cannot sit, I would not assign her or him.

THE COURT: Go ahead.

MR. SCHAEFER: Thank you.

BY MR. SCHAEFER:

Q And I just wanted to come back to senior judges. You, of course, were here when Judge Satter testified. Is it fair to say a senior judge can perform administrative duties?

A Can and does.

Q All right. Now I want to ask about the state trial referees. Can they perform any administrative duties?

A Yes.

Q Do they?

A Yes.

Q Could you just give us a few examples?

A Well Judge Sponzo, who's in the courtroom, performs administrative duties daily.

THE COURT: Today?

THE WITNESS: Every day. From 1984 to the present. Occasionally misses a day, but not often.

BY MR. SCHAEFER:

Q And what type of duties are those?

A Judge Sponzo was my principal agent with respect to the judicial performance evaluation committee.

In addition, however, he performs a full range of duties and is also principally responsible for coordinating the meetings that we have on a quarterly basis with the Department of Public Works and others concerning facilities, construction, and maintenance of facilities.

Q And are there any other examples you can give us on administrative duties?

A For other judges, other referees?

Q State trial referees, right?

A We have a pre-trial or pre-argument settlement plan that is in effect for the appellate process. Senior judges and referees administer that program, as well as being the individual who, in fact, tries to resolve these issues.

Senior Associate Justice Santaniello is the principal coordinator. Referee Bieluch is another individual involved in the program.

Q And I just wanted to come back to this process of certification, I think you've adequately explained it, but I just want to make sure we have it in the record.

Could you just briefly tell us how the process of certification —

A Yes. In May of each year my office sends a form to the referee asking whether she or he wishes to be redesignated. If the response is yes, then the form is forwarded to the administrative judge for each of our twelve judicial districts.

That judge has to indicate to me whether or not that judge has sat, whether or not that judge is available for sitting, whether or not that judge — and when I say "judge" I really am talking about referees at this point — whether that referee is able to sit, with a list of questions. If the answer to any of those questions is no, the administrative judge is directed by me to discuss the matter with the referee. If the answer is yes, obviously it comes to me, I just certify it for the Chief Justice, and it goes on to her.

If there is a question after the discussion between the referee and the administrative judge, if the administrative judge still doesn't feel that she or he can certify that individual, I speak to the referee and make a final decision.

Q I want to ask you something about your contacts and experience with the state legislature beyond what you've already testified to prior to appointment.

Do you submit a biennial report to the legislature concerning recommendations as to court operations?

A Yes.

Q And do you have any other contacts with the legislature as Chief Court Administrator?

A Yes. A major portion of my responsibility is to deal with the legislature.

When they are in session, I perhaps will spend one-quarter to one-third of my time dealing with the legislature every day.

When they're not in session, it's not as demanding, but I still believe it would be five to ten percent of my time year-round.

Q And as Chief Court Administrator, have you had any experience in determining legislative reactions to, well, Judicial Department issues?

A Yes.

Q And could you tell us about that, please?

A The Department annually submits between 20 and 30 legislative proposals. When those proposals are submitted, I then go before the General Assembly, principally the Judiciary Committee, and testify on those bills, respond to questions, and have a series of one-on-one conversations with the legislators relative to those proposals.

Additionally, I am asked to comment upon any proposed statute that would impact the Judicial Department. In order to perform those tasks, I spend a great deal of time discussing matters with legislators. There is no hesitation on their part to give me their opinion about those questions, or anything else.

Q You may have testified to this, and excuse me if you have, but about what percent of your time is spent in meeting with the legislature?

A During the session, 25 percent, perhaps more.

THE COURT: Mr. Schaefer, I'm just wondering, what is the probative value of this particular testimony?

MR. SCHAEFER: I'm going into what we anticipate the legislative reaction would be to striking down the constitutional provision.

THE COURT: I see. Yes.

MR. SCHAEFER: Then I have to, I think, establish a foundation that the Judge is in contact with that.

THE COURT: That's fine. I just wanted to know what it is.

MR. GOULD: Your Honor, I'm going to be objecting to too much inquiry into this.

So far I don't see why he can't testify, but I honestly don't see if we're going to hear testimony about what the legislators may or may not do in response to this case, I don't think that's relevant. I think it's speculation; it can only be founded on hearsay.

THE COURT: Well, we'll find out. We'll take it for what it may be worth.

BY MR. SCHAEFER:

Q Have you had — in general, have you had discussions with the legislature concerning the effects of judicial invalidation of state statutes?

A Yes.

Q And have you had any such discussions concerning this case?

A Yes.

Q And without going into them and telling us what they were at this point, can you tell us, have those discussions been with any members of the Judiciary Committee?

A Yes.

Q Legislative leadership?

A Yes.

Q Now, based on your experience and your knowledge, and your work with the General Assembly, what effect, if any, do you anticipate there would be on the State Judicial Department if the provision concerning mandatory retirement of judges at age 70 were to be struck down?

MR. GOULD: Your Honor, I object to the question as calling for speculation and based on opinion that I don't think he's qualified to anticipate what could happen as a result of this case.

THE COURT: May I have the court reporter read the question back.

(Question Read Back).

MR. SCHAEFER: Your Honor, first, we're doing this one step at a time. I think we qualified him as an expert through his government experience in three branches of government — through his general experience having served as an aide in the General Assembly, more specifically, his contacts with the General Assembly as Chief Court Adminis-

trator, one of his functions being to ascertain legislative reaction to various Judicial Department issues, and the testimony that he has discussed this case with members of the legislature — specifically, the Judiciary, or including, I should say, the Judiciary Committee and the leadership.

And beyond that, I think it's the weight of the evidence. It is opinion perhaps, but I believe he's qualified as an expert opinion.

THE COURT: We'll take it for what —

MR. GOULD: I also have an objection for the foundation if it's based on discussions with parties who aren't here and it would be based on only hearsay information.

THE COURT: The objection is overruled. We'll take it for what it may be worth.

MR. SCHAEFER: I think the Federal Rules well establish that, your Honor.

THE COURT: Go ahead.

BY MR. SCHAEFER:

Q Would you like the question read back or do you understand my question?

A I think I can still remember the question, Mr. Schaefer.

Q Yes. Thank you.

A There are several probable responses by the General Assembly.

The first I believe would be for them to re-examine the constitutional provision for eight year terms. It has been suggested several times that they feel that if, in fact, the

present constitutional basis for the eight year term is invalid, they would review that with the idea of shortening the term to allow them to have a more frequent review of the judges.

Q Now, why would they want to shorten the term?

A They would want to shorten the term because they would feel that an eight year term would be too long in view of what they consider to be the higher degree of likelihood of infirmity at later ages.

Q Now, before I get back to the legislature, have you had any experience as Chief Court Administrator with that issue which you just testified to?

A Well, in the process that I explained earlier with respect to re-designation, yes, there have been instances where judges were not re-designated because of infirmity.

Q And have you had any experience in whether or not this is a greater problem at more advancing years of age than it is at earlier years of age?

MR. GOULD: That can be answered yes or no, your Honor. If he goes further, I have to object.

A Yes.

BY MR. SCHAEFER:

Q Could you tell us what your experience has been in that?

THE COURT: You have an objection, Mr. Gould?

MR. GOULD: Well, I think there should be some foundation for the basis of this. I mean, is he doing it from — has he heard of instances, has he been there, has he talked to people?

THE COURT: Why don't you try to lay a greater foundation, Mr. Schaefer.

MR. GRAZIANO: Your Honor, —

MR. SCHAEFER: Well, your Honor, there is testimony —

THE COURT: Hold on a second.

Sir?

MR. GRAZIANO: Your Honor, I think the Government would object further. The fact that he may have had some experience, even very specific and maybe very firsthand, I'm not quite sure that that's relevant enough in the scheme of things to establish some kind of a pattern that older employees across the board developed greater infirmity. I think that that's an area of expertise that, with all due respect, I don't believe Judge Ment is qualified to answer.

MR. SCHAEFER: Well, I'm not just asking his own experience concerning the Judicial Department, your Honor.

THE COURT: The objection is overruled. Go ahead. But do lay a foundation in accordance with Mr. Gould's inquiry.

MR. SCHAEFER: Yes, your Honor.

BY MR. SCHAEFER:

Q Without telling us at this point the results of your experience, could you tell us what your experience has been, that is, how you know this?

A One of the responsibilities of the office is to, with respect to judges, is to admonish judges or to relieve them of responsibility when they have — when there is a belief,

a reasonable belief that they may, in fact, be subject to drug abuse, other infirmities associated with drug and/or alcohol, and also with respect to mental infirmities.

So through the judicial performance evaluation committee, and through observation, and through the administrative judges, I am informed when there is a possibility that such infirmity exists.

With respect to referees, obviously through the designation process I am informed annually for each referee as to his or her status.

Q And based on the information that has come to your attention in your work as Chief Court Administrator, could you tell us what the results of your experience has been on this issue?

A With respect to judges —

MR. GOULD: Excuse me, your Honor.

Which issue are you referring to?

MR. SCHAEFER: Well, the issue we are dealing with — and that is the greater likelihood of infirmities at more advancing years of age than at earlier years of age, for which I have to lay the foundation.

MR. GOULD: Are you asking him whether he's seen greater infirmities for people who are more than a certain age?

MR. SCHAEFER: The question is as stated in the record.

THE COURT: The objection is overruled. Let's let him proceed.

Mr. Schaefer, go ahead.

MR. SCHAEFER: Thank you, your Honor.

A With respect to judges, and by definition these are individuals under 70, I have had only rare occasions to be concerned about their infirmities — and I'm not speaking about physical infirmities at this point — and there are approximate 160 judges of the Superior Court, including senior judges, there are approximately 39 working referees, and I have had more occasion to have to intervene with respect to those individuals than the other category.

BY MR. SCHAEFER:

Q Now, if the legislature were to shorten, through the constitutional process, the term from eight years to a lesser term — I don't want to put words in your mouth, I believe you mentioned four years, am I correct on that?

A That was the figure that's been mentioned to me and one I repeated to the Court earlier, yes.

Q All right. What effect would that have on judicial independence?

MR. GOULD: Objection, your Honor, for reasons stated before.

THE COURT: Overruled. Go ahead.

A The shorter the term, the more difficult the issue of judicial independence becomes.

We already have a situation where many judges are concerned, especially in the two or three years prior to their reappointment. Several judges recently were not reappointed by the General Assembly, and the difficulty of balancing independence versus accountability is one that we struggle with every day.

The shorter the term, the more weight there is on the accountability side, the less weight on the independence side, and I have great concern that the judicial independence in Connecticut would be lessened.

BY MR. SCHAEFER:

Q Why can't the legislature rely on some of these other methods to deal with these problems, such as the Judicial Review Council, and the impeachment process, and the removal by address of the General Assembly, two-thirds, I believe?

A Those processes are deliberately made cumbersome and difficult to use, as they should be.

When those methods are used, and they've been used infrequently to my knowledge, the entire bench suffers. And I think the legislature realizes this and is reluctant to use them and reluctant to rely upon them.

Q Now, would striking down the mandatory age retirement provision of age 70, would this have any other effects on Judicial Department operations other than what you mentioned?

MR. GOULD: Objection, your Honor, for the reasons stated before.

THE COURT: Overruled. Go ahead.

A We would be limited in the number of judges or in the number of individuals that we would have available to us to perform the necessary functions of the court.

For example, it would be less likely that we would have as many referees as we now have. And the referee program as it now is constituted is really a two-for-one.

We have the use of the referee when that referee cares to work, which in 39 instances is fairly often during the year. And we also receive a replacement judge. We would not have that under the other theory.

Q Now, would this have any — apart from that, would this have any effect on the issue of judicial turnover?

A One of the things that we're looking for is to make the bench more representative of the society in which we live. There would be less turnover. There would be less turnover, less opportunity for women and minorities to enter the system.

Q Just moving along here, looking at some of these other alternatives, why couldn't we just provide in Connecticut for our state courts life tenure for judges and then have their actual assignments depend on their ability to handle cases?

A The General Assembly will not consider such a possibility, in my opinion, during any of our lifetimes.

Q And could you —

A Two years ago the Chief Justice made a suggestion to that effect in her address to the General Assembly and to the Judiciary. I'm still reminded of that address today. Not literally today, obviously, but within weeks. It's not going to happen.

Q And the legislative concern, without going into any detail, is the legislative concern the issue of the balance between accountability and independence?

A The legislature, in my opinion, Mr. Schaefer, simply is not ready to provide Connecticut judges with that security.

MR. SCHAEFER: I think we've covered our key questions, your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. GOULD:

Q Judge Ment, I think you mentioned that criminal matters may be assigned to senior judges, isn't that correct?

A It's really the reverse. I may assign judges, senior judges, to criminal matters.

Q And you have done that in the past?

A Yes.

Q Okay. And you are prohibited from assigning criminal matters to referees or to trial referees, isn't that right?

A The answer to your question is yes. The question, though, was in slightly improper form in that I don't assign matters to referees, but they are not allowed to handle the cases.

Q Okay. That's basically what I was getting at.

And —

MR. SCHAEFER: Excuse me. I just want to point out that some of this is covered in the stipulation on what state trial referees can do on criminal cases.

THE COURT: Yes.

MR. GOULD: Well, this is just clarification, your Honor.

THE COURT: All right.

MR. GOULD: I only have a couple more questions.

THE COURT: Go ahead, Mr. Gould.

BY MR. GOULD:

Q Now, you do know of instances, do you not, that trial referees have not been able to serve on, to preside over civil jury trials because parties haven't consented?

A Yes.

Q And as I understand your testimony, it was only one senior judge, Justice Santaniello, who has administrative duties?

A No, sir. He is the only Senior Associate Justice of the Supreme Court, to my knowledge, who has administrative responsibilities.

Q There are other senior judges that do?

A There are other senior judges who do — Judge Satter being one.

Q The one that he mentioned?

A Correct.

Q However, it's fair to say, isn't it, that most of the administrative duties are performed by judges of the Superior Court, isn't that correct?

A Yes, it is.

MR. GOULD: I have nothing further, your Honor.

THE COURT: Yes, sir.

MR. GRAZIANO: Your Honor, if I may just ask one or two questions following up.

CROSS-EXAMINATION

BY MR. GRAZIANO:

Q On the issue of administrative duties. With regard to a judge, generally speaking, how much of their time is spent doing what we associate as judges do: hearing cases, how much time is spent doing administrative duties? Approximately?

A It would depend on the judge. I don't want to bore you with a detailed explanation of our system. Some judges never hear cases, some judges only hear cases, and I think the mix in between would cover every step along the way.

If you want a general ballpark figure, and if you want — how do you want to define "administrative responsibilities"? Because when you say "hearing cases," I would say most of our judges hear cases infrequently. Most of their responsibilities are other than actually presiding over trial of a case.

Q Well, by "hearing cases," perhaps let me explain that.

Having to do with the adjudication of cases, whether it's reading trial briefs or writing opinions, as opposed to administrative things, which I would take to be other than the law-giving, other than being involved in adjudication of cases?

A Would "administrative" then, sir, be assignment of cases? We have master calendars, as well as individual calendars. How would assignment of cases break?

Q I would leave that up to your judgment.

A I would consider that administrative. Therefore, I would say if you would exclude the administrative judges, there are twelve of those, and exclude the presiding judges on civil/criminal — I guess civil and criminal are the major areas, which would probably be another eight to ten, excluding those twenty judges, the remaining portion of the bench would spend the overwhelming majority of their time in case-related activities.

Q Would that also be true of senior judges?

A No. No senior judge presently serves in a capacity that would be considered primarily administrative.

Q And state trial referees?

A Judge Sponzo excepted, because he serves completely in an administrative capacity and he is a state trial referee, excluding Judge Sponzo, the responsibility of the other referees is limited, probably the same as the judges who we did not exclude earlier, as being a mix between administrative and case responsibilities.

MR. GRAZIANO: I have no further questions.

THE COURT: Ms. Emmett?

CROSS-EXAMINATION

BY MS. EMMETT:

Q Judge Ment, I realize that this is probably possible to figure out from the statutes if you can manage to fit them all together, but I was wondering if you could briefly describe, or I will ask you questions and you can tell me if I'm right or wrong, what the options are available to Connecticut's older judges? Perhaps I'll ask a few questions.

As I understand it, after 20 years of service, or at age 65, Connecticut's judges have the option to retire, is that correct?

A Yes.

Q And if a judge chooses to retire, is it also correct that depending on the age that judge is at, he or she will either become a senior judge or a referee, is that right?

A Yes.

Q And prior to the age of 70, any judge who retires will become a senior judge, is that right?

A Yes.

Q And 70 and thereafter, a judge who retires becomes a referee?

A Yes.

Q All right.

THE COURT: Excuse me just one second.

And in either case, Judge Ment, is it not the case that a replacement would be put in the place of the judge who becomes a senior judge or referee?

THE WITNESS: Yes, Judge Cabranes, there's a replacement in either case.

THE COURT: So going back to some of your earlier testimony, what difference would it make for replacement purposes, if any, whether a judge becomes a senior judge or a referee? None, I take it?

THE WITNESS: None. No.

THE COURT: Okay. Go ahead.

BY MS. EMMETT:

Q Judge Ment, along those same lines, we've been talking about the age 70 and the effect it has in the Connecticut judicial system. And am I correct in saying that there are really two effects which that age has:

The first being — you may think of others, but at least two: the first being that if a judge has not retired prior to the age of 70, then under the Connecticut Constitution a judge is required to retire at that time?

A Yes.

Q All right. And the second of the two that at least I think of is that if a judge has already retired and become a senior judge, that when that judge reaches the age of 70 he or she will become a referee, is that right?

A Yes, it is.

Q All right. Now, one thing which is difficult to discern and possibly available in the legislative history, but I am curious about because of the circumstances here, is whether you have any knowledge concerning why the senior judge status was created in the first place?

A Yes, I do.

Q And could you explain to the Court why that is?

A The senior judge status was initiated or created in order to give the judges a second option for retirement.

Q All right. And is it also true that after Connecticut law had changed so that judges under the age of 70 were able to retire, that there was some question in people's minds as to

whether those judges under the age of 70 had constitutional authority or legislative authority to enter judgments, is that right?

MR. GOULD: Objection, your Honor.

MS. EMMETT: That may be a very confusing question.

THE COURT: Overruled. Go ahead.

A I don't know the answer to that question, anyway.

BY MS. EMMETT:

Q All right. With respect to senior judges and referees, am I correct that the pay that they receive is the same — that, in other words, their per diem salary is the same and their retirement benefits vary according to what —

A Between senior judges and referees, I believe it's the same across the board.

Q All right.

THE COURT: Meaning per diem or salary?

THE WITNESS: Meaning the per diem is the same. They receive two-thirds of the salary — well, we have pre-'81 judges and post-'81 judges, but generally speaking they receive two-thirds of the salary, if you're a pre-'81 judge, of the office. A post-'81 judge is two-thirds of the salary at the time that you retire, plus COLA's.

In addition, $125 per day that you work; per diem.

BY MS. EMMETT:

Q Those judges who have retired and become senior judges and referees work only at their option, is that correct?

A Yes.

And perhaps, Judge Cabranes, in response to your question I should point out that they can only earn up to the salary of the office. They can only earn the one-third difference.

The principal other fact is that the five percent retirement fee taken out of the salary of a sitting judge, of a judge, is not taken out of the salary of a referee or a senior judge.

BY MS. EMMETT:

Q Thank you.

Are you aware of, among the senior judges and referees, whether they all work to the maximum amount that they are entitled to work under the current system?

A I am aware that they all do not work to the maximum.

Q There are on occasion I believe, and correct me if I'm wrong, some at least among the referees who may work up to the maximum?

A There are some who work up to the maximum and work beyond the maximum. They're simply not paid beyond the maximum.

Q All right.

THE COURT: Perhaps while Ms. Emmett is up, I can interject a comment and a question, because she may want to pursue this.

The record perhaps does not reflect, but it should reflect the fact that shortly after this case was commenced and the court had entered a temporary restraining order, the court inquired of the parties as to the position or role in this litigation of other members of the state judiciary.

You recall that, Mr. Schaefer, when I asked about that, and —

MR. GOULD: I recall it, yes, your Honor.

MR. SCHAEFER: I do recall it, yes, your Honor.

THE COURT: Yes. Among other things, I was interested to know whether we might expect other state judges to seek to intervene in the lawsuit, whether the plaintiff would seek to bring this action as a class action, or whether the association of state judges intended to participate in any way.

At first blush, I have to say, I had assumed that state judges would have a common interest in these matters and, indeed, that that common interest would be substantially identical to that asserted by the plaintiff, Judge Satter.

Now, it is apparently the case that the only state judges who have elected to state their views to this court are state judges who have asserted views adverse to those of Judge Satter. All of this prompts me to ask counsel a question that perhaps takes us back over some of the terrain already covered by the testimony of Judge Ment, and it is this:

Whether this witness might be an appropriate person to address the question as to what the views of other judges might be? Or to put it another way, as to why no other state judge has apparently elected to side with the plaintiff in this case?

This may not be entirely relevant, but in view of the earlier colloquy with counsel on this matter, it might be useful to have some sense of what the apparent interests are.

MS. EMMETT: All right. Your Honor, I will ask Judge Ment, in view of your concern here, if he has any awareness of what discussion there has been concerning this case within the Judicial Department.

THE WITNESS: Yes, I do.

BY MS. EMMETT:

Q And can you summarize if you will what — I'm not saying that you can say what every judge thinks, but what the nature of that discussion has been?

A The Department in itself, obviously, I am here on behalf of the Department testifying.

With respect to the judges that I've spoken to, and I've spoken to fifty, seventy-five, perhaps a hundred judges of the 150, they are very concerned about this matter. All that I have spoken to feel that the Connecticut system is finely honed in that we have various options for the judges as they proceed to their later years, that it's a fair system, and that it should continue.

Q And are you aware whether the judges' association in its meetings has considered getting involved in this case?

A I attended a meeting where they had a discussion concerning this matter. My recollection is that they thought it would be inappropriate for them to become involved.

THE COURT: This may be an unfair question, Judge Ment, but you obviously know the substance of this lawsuit, and you know your department exceedingly well. The question is unfair because I'm asking you to characterize what an opponent in litigation might want.

But doesn't it strike you that Judge Satter is asserting here some kind of an interest — that is, that were he to prevail, he would obviously be deriving some advantage, would he not? Or is it your view that there is no advantage?

THE WITNESS: I don't think there's a real advantage.

If, in fact, he prevails, he then sits or not sits at my discretion or at the discretion of my successor. I don't think that's any better than what he would have as a referee.

And with respect to his ability to sit on criminal or civil juries, he doesn't have that right if, in fact, I don't assign him to those categories of cases.

So I think it's a question of whether a judge would rather serve in a capacity designated by the Chief Court Administrator, or whether the judge wished to be limited by statute.

THE COURT: But presumably there would be no yearly review, is that right? Or would there be? As a senior judge.

THE WITNESS: There would be no yearly review. However, there would be, I assume, a daily review — that is, if word came to me that was reasonable that a judge was, in fact, not able to sit, that judge would no longer be assigned.

Now, obviously, we don't have that at this point, except in very limited instances, and we don't have a procedure. If we needed one, we would set up a procedure I assume similar to the referee procedure so that I could be assured that individuals serving as senior judges would be qualified to sit.

BY MS. EMMETT:

Q All right. Along those same lines, Judge Ment, you do make a decision about assigning judges on a regular basis, is that right?

A Absolutely, as you well know.

Q How often do you make assignments for the judges to sit?

A We make assignments every six months. We are trying very hard not to move judges except once a year at the most, and hopefully not for two years.

But we do make them every six months, and they're all subject to reassignment every six months.

Q Thank you.

There's just a couple of things that are probably covered in the stipulation or elsewhere, but I'd like to correct one impression.

It is true that in a limited sense a referee is able to sit on criminal cases on a three-judge panel in a murder case, is that not right?

A I believe it is, and I stand corrected.

Q All right. And also on the scheduling issue, is it true that referees are free to schedule their own cases according to the schedule they choose to follow?

A Yes. And they're in great demand, and they can have as many cases as they need.

We don't have referees in places like Danbury, I think there are only two referees in Fairfield County, none in New London. We need referees, and don't have them, so those who wish to can do so.

Q All right. And, in fact, doesn't it happen on occasion that parties go to another judicial location in order to have their cases heard by a referee — for example, I know, or this is a question — isn't it true that some cases from Stamford may be referred to Bridgeport to be heard by the referees there?

A Yes.

Q All right. Now, a senior judge, by contrast, does not function on the self-assignment system, is that right?

A That is correct.

Q And how do assignments — how does a senior judge receive his or her cases?

A Senior judges receive their assignments the same as any other judge — that is, through the mail as I assign them every six months, with one exception: because senior judges have voluntarily elected that status, I normally will consult with a senior judge before she or he has an assignment change.

MS. EMMETT: I have no further questions.

THE COURT: Any other questions, Mr. Gould?

MR. GOULD: I have just one question:

BY MR. GOULD:

Q You say that you don't think that, from what you understand, that judges are really supporting Judge Satter in this case, right?

A Yes.

Q So most of them are probably going to choose the option to retire and become state trial referees, isn't that right?

A I don't know. I think they're not supporting Judge Satter because they're fearful of the consequences from the legislature and others if the suit is successful.

Q You know that there have been some judges who have reached age 70 since this case started and have chosen to retire, rather than join this case, isn't that right?

A That is absolutely correct.

Q If that trend continues, you won't have any problem, will you, in filling that extra seat for that judge once he or she becomes a state trial referee?

A If the trend continues we will have no more trouble than we have now.

Q Thank you.

A You're welcome.

THE COURT: Mr. Graziano, any questions?

MR. GRAZIANO: No questions, your Honor.

THE COURT: Mr. Schaefer?

MR. SCHAEFER: Excuse me. If we could have just a minute, your Honor.

(Pause)

REDIRECT EXAMINATION

BY MR. SCHAEFER:

Q Judge Ment, just a couple questions. Your answers to counsel for the plaintiff's question about that you wouldn't have any problems, judges would continue to retire, is it fair to say that's predicated on the law continuing as it is, there being no change in the state constitutional mandatory retirement provision?

A Yes.

Q And another question: you were asked there have been instances where parties did not consent to civil jury trial

before a state trial referee. I want to ask you: Have there been cases where parties did consent to a civil jury trial before a state referee?

A Yes.

Q And, generally, what does that decision depend on?

MR. GOULD: Objection, your Honor.

How is he going to be able to tell what's going through counsel's mind in every particular case as to whether they're going to object to a certain trial referee? I just think that's totally speculative.

THE COURT: Sustained. But without prejudice to further inquiry.

BY MR. SCHAEFER:

Q Well, do you have any information that would tell you what are the factors that go into whether a party will consent to a jury trial in a civil case before a state referee?

A I do not.

Q All right. But there have been instances where parties do consent to those civil trials?

A Mr. Schaefer, it happens on a regular basis. Trial referees do often preside over jury cases, but I don't know why some are selected and others are not.

MR. SCHAEFER: I think you've answered the question.

Thank you, your Honor.

THE COURT: Thank you very much. Any other questions for Judge Ment?

MR. GOULD: I have nothing further.

THE COURT: Thank you. Absent objection or further comment, Judge Ment may step down.

THE WITNESS: Thank you, Judge Cabranes.

THE COURT: You're excused.

(Witness excused).

THE COURT: I take it that you are resting, Mr. Schaefer?

MR. SCHAEFER: Yes, we are, your Honor.

* * * *

THE COURT:

* * * *

Thank you very much.

We're adjourned.

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